UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF LOUISIANA

IN RE:	CASE NO. 02-11257
JAZZLAND, INC.	CHAPTER 11
Debtor	SECTION "B"

RICHARD L. NOBLE, as Disbursing Agent for Jazzland, Inc.,
Plaintiff

Versus **ADVERSARY NO. 03-1202**

ADP, INC., ALLFAX SPECIALTIES, INC., AMERICAN ENGRAVERS, INC., AMERICAN MINORITY BUSINESS FORMS, BARBE'S DAIRY, INC., DASH BUILDING MATERIAL CENTER, INC., EDDIE SAPIR, GULF SOUTH WHOLESALE, INC., IMAGES EVERYWHERE!, INC., J. GROUP CONSULTING, LLC, JAMES SINGLETON, LOUISIANA COCA COLA BOTTLING CO., LTD., RGIS INVENTORY SERVICE, SKY COASTER, TELECHECK SERVICES, INC., THE TIMES-PICAYUNE NEW MEDIA CORPORATION, TUFF EQUIPMENT RENTALS, LLC, WELLS FARGO FINANCIAL LEASING, INC.

MEMORANDUM OPINION

This matter came before the court on the amended complaint of Richard L. Noble, Disbursing Agent for the Chapter 7 Bankruptcy Estate of Jazzland, Inc. ("Noble" or "Disbursing Agent") to avoid a transfer pursuant to 11 U.S.C. §§541, 547 and 548 and Louisiana Civil Code Article 2036, et.seq. and the answer filed

thereto by Images Everywhere!, Inc. ("IE"). A trial was scheduled to occur on October 19, 2004. At the request of the parties, the matter was submitted upon briefs. For the reasons expressed below, the court finds in favor of IE, and will dismiss the amended complaint as to IE.

I. Background.

On January 3, 2000, Jazzland and IE entered into a license agreement. Under the agreement, IE was granted a license to operate a concession in Jazzland until the end of the 2002 season. Section 5 of the license agreement provides that IE collect and submit all proceeds from its operations to Jazzland, which would deduct sales tax and then remit to IE its share of the proceeds.[1]

On or about February 7, 2002, Jazzland paid IE $3,686.11 for amounts owed pursuant to the license agreement. Jazzland filed a voluntary Chapter 11 petition on February 28, 2002, and its plan of reorganization was confirmed on August 7, 2002. Richard L. Noble is the duly appointed and authorized disbursing agent under the Plan, and has brought the instant complaint to avoid a preferential transfer paid to IE.

The parties have stipulated that the transfer of $3686.11 was made while Jazzland was insolvent. They also stipulate that, as part of Jazzland's First

[1] License Agreement, sections 5A - 5B.

Amended Plan, the license agreement was assumed by the debtor. The parties assert that the only contested matters of law are as follows:

1. Whether the $3686.11 at issue was for or on account of an antecedent debt that Jazzland owed to IE.

2. Whether the transfer of the $3686.11 at issue enabled IE to receive more than it would have received if it had been paid on its claim in a Chapter 7 liquidation.[2]

II. Applicable Law.

The elements of a preference are set out in §547(b) as follows:

> [T]he trustee may avoid any transfer of an interest of the debtor in property–
> (1) to or for the benefit of a creditor;
> (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
> (3) made while the debtor was insolvent;
> (4) made–
> (A) on or within 90 days before the date of filing of the petition; or
> (B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and
> (5) that enables such creditor to receive more than such creditor would receive if–
> (A) the case were a case under chapter 7 of this title;
> (B) the transfer had not been made; and
> (C) such creditor received payment of such debt to the

[2] Pre-trial Order, P. 138.

extent provided by the provisions of this title.[3]

Once the trustee meets this burden, the defendant must establish one of the exceptions contained in Section 547(c) to prove the nonavoidability of a transfer.[4]

IE asserts that §547(b)(5) requires, among other things, that a transfer in order to be avoided as a preference enable a creditor to receive more than it would have received if the debtor's assets had been liquidated and distributed under Chapter 7. This determination is affected by whether the debtor assumed or rejected an executory contract under which the transfer at issue occurred. IE argues that because Jazzland assumed the license agreement, it was required to cure all defaults associated with the agreement, and therefore the prepetition payment, as a matter of law, is not preferential as IE did not receive more than it would have in a Chapter 7 liquidation.

No Fifth Circuit decision squarely on this point could be located. The court finds persuasive, however, decisions from the Seventh and the Ninth Circuit holding that a preference action is not available where the debtor assumes an executory contract or unexpired lease under which the alleged preferential transfer

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[3] 11 U.S.C. § 547(b); *In re El Paso Refinery*, 171 F.3d 249, 253 (5th Cir. 1999).

[4] *In re El Paso Refinery*, 171 F.3d at 253; 11 U.S.C. § 547(g).

was made.[5] For example, in *Superior Toy & Mfg. Co., Inc*.[6], the Chapter 7 trustee brought a preference suit to recover payments made to a creditor. The payments were monies due the creditor under the terms of a licensing agreement with the debtor. The licensing agreement was assumed by the debtor during the initial Chapter 11 proceedings, prior to conversion of the case to Chapter 7. The appellate court determined that, as a matter of law, the debtor's assumption of the licensing agreement under §365 precluded a finding that the pre-petition payments were preferential under §547(b)(5). [7] The court rejected the argument that the trustee is entitled to both assume a contract and bring a preference suit,[8] reasoning that ". . . Congress passed §365 to insure that a contracting party is made whole before a court can force the party to continue performing with a bankrupt debtor. Permitting a preference suit after an assumption order would undermine that purpose."[9]

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[5] *In re Superior Toy & Mfg. Co., Inc.,* 78 F.3d 1169 (7th Cir. 1996); *In re LCO Enterprises*, 12 F.3d 938, 941 (9th Cir. 1993). This result was also reached in the case of *In re MMR Holding Corp*., 203 B.R. 605, 613 (Bankr. M.D. La. 1996)(". . . it can be said without qualification that the act of assumption precludes the application of section 547(b)(5),").

[6] 78 F.3d 1169 (7th Cir. 1996).

[7] *Id*. at 1171.

[8] *Id.* at 1172.

[9] *Id*. at 1174.

Similarly, in *In re LCO Enterprises*,[10] the Chapter 7 trustee sought to recover prepetition rent payments as avoidable preferences, after the debtor in the original Chapter 11 proceeding had assumed the underlying lease. The Ninth Circuit held that the trustee could not use the preference provisions of §547(b) to circumvent the requirements of assumption contained in §365(b).[11] The court stated that, for a §547(b)(5) analysis, §365 conditions the debtor's continued use of property on the cure of any default. An avoidance action brought after assumption of the underlying lease is approved would permit the trustee to "avoid payments that it was obligated to make pursuant to the court-approved assumption of the lease through confirmation of the plan. The Trustee cannot use §547(b) to circumvent the requirements of §365(b)."[12]

The court finds the reasoning in these opinions to be persuasive. Under §365, if assumption is approved, as it was in this case, the debtor must cure all prepetition defaults under the assumed contract. The estate cannot become bound to pay amounts due under an assumed contract and also recover for the estate payments made prepetition under the contract.

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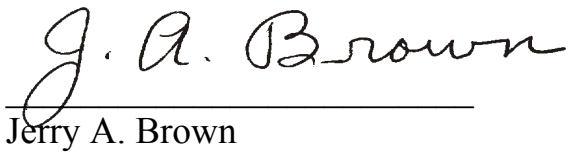
[10] 12 F.3d 938 (9th Cir. 1993).

[11] *Id*. at 943.

[12] *Id.*

For the foregoing reasons, the court will enter an order dismissing the complaint as to Images Everywhere!, Inc.

New Orleans, Louisiana, December 16, 2004.



Jerry A. Brown
U.S. Bankruptcy Judge